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Supreme Court Decisions

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WATER RIGHTS—CONSTRUCTION OF ADJUDICATION DECREE—ADMINISTRATION BY WATER OFFICIALS—EXCESSIVE DIVERSION—INJUNCTION—*Hassler, et al. v. The Fountain Mutual Irrigation Company, et al.*—No. 12594—*Decided July 3, 1933*—*Opinion by Mr. Justice Bouck.*

A water adjudication decree had awarded defendants senior rights and the plaintiffs junior rights. The amount of each priority was not stated in second feet, but was based merely on the capacity of the respective ditch and the acreage it was intended to irrigate therefrom, being 100 acres for defendants and 450 for plaintiffs. In practice, the State water officials had interpreted the decree to entitle defendants to 9.84, and plaintiffs to 9.36 second feet of water, and these appear to have been the amounts used for many years. Plaintiffs seek by injunction to limit defendants' diversion to less than half what defendants have been using.

1. The Supreme Court has no right to say that there is a fatal discrepancy between the amounts of water allowed each ditch as compared to the acreages irrigated, which the trial court ought to have considered as vitiating the presumably honest judgment of a long line of water officials who have deliberately administered the decree.—*Judgment affirmed.—Mr. Justice Hilliard not participating.*

MUNICIPAL CORPORATIONS—OFFICIAL OF—INJUNCTIONS AGAINST—LEGISLATIVE INJUNCTIONS—*Denver vs. Gibson, et al.*—No. 12691—*Decided July 3, 1933*—*Opinion by Mr. Justice Hilliard.*

1. The manager of health for the City and County of Denver, claiming authorization under a city ordinance which regulates the milk business and which provides for the sale and distribution of raw milk and cream, pasteurized milk and cream, made an order requiring all milk distributed in Denver to be pasteurized. The trial court enjoined him from enforcing the order.

2. Though it is a general rule that health officers should be privileged to exercise reasonable judgment, still their acts must be legal, consistent with the source of their power and the limitations thereof. The ordinance by authority of which the manager of health sought to prevent the sale and distribution of raw cream, insisting that all milk products must be pasteurized, was an ordinance regulating the sale and distribution of raw cream and milk. Under the ordinance the plaintiffs below had obtained licenses. The effect of the order of the manager of health not only interfered with the licenses granted, but in effect nullified the ordinance. The injunction should therefore stand.—*Judgment affirmed.*

CONSTITUTIONAL LAW—WATER RIGHTS—INTERSTATE COMPACTS FOR ROTATION OF WATERS—OBLIGATION OF CONTRACTS—DUE PROCESS OF LAW—*The La Plata River and Cherry Creek Ditch Company v. Hinderlider, et al.*—No. 12796—*Decided July 3, 1933*—*Opinion by Mr. Justice Burke.*.

In an action against the State water officials, plaintiff unsuccessfully sought a mandatory injunction to compel defendants to permit it to divert water from the La Plata River, when water was in the stream available for its priority. Defendants set up, as a defense, the La Plata River Compact, entered into between the States of Colorado and New Mexico, and ratified by the legislatures of both states and by the Congress of the United States. Under said compact the waters of said river are rotated to meet, as nearly as possible, the rights and needs of appropriators in both states. Such system of rotation interferes with plaintiff's use of its decreed appropriation.

1. No state has power to enter into a compact which violates federal or state constitutions.

2. Plaintiff holds its water decree, and demands water thereunder, pursuant to statutes passed under the provisions of Secs. 5 and 6, Art. 16 ,Colorado constitution. These together rise to the dignity of a contract, the impairment of the obligation of which is prohibited by federal and state constitutions.

3. A decreed water priority is a property right and a freehold, of which its owner may not be deprived without due process of law. An interstate compact is not such due process.—*Judgment reversed and cause remanded—Mr. Justice Butler dissents; Mr. Justice Campbell not participating.*

WORKMEN'S COMPENSATION—COMMON LAW WIDOW—WHAT CONSTITUTES—*Clayton Coal Co., et al. vs. The Industrial Commission*—No. 13291—*Decided July 3, 1933*—*Opinion by Mr. Justice Butler.*

1. Claim was made before the Commission by Mary Tsikiris as the widow of Mike Tsikiris. It is admitted by the defendants below that if the claimant can establish the fact that she was the wife of Tsikiris at the time of his death, she is entitled to compensation. It is admitted that there was no ceremonial marriage, but it was contended that the evidence was insufficient to support the findings of the Commission that there was a common law marriage. The evidence by several witnesses was to the effect that the claimant had lived with Tsikiris for four or five years before his death; that they had lived together as husband and wife; that Mike introduced her as his wife; referred to her as his wife; that everyone thought they were husband and wife; that she bought supplies at the stores and charged them to him; that on Mike's deathbed he told several witnesses that he wanted his wife to have all his property, including his car and some money in the bank.

2. Mary testified that she and Mike lived together as husband and wife, but that they had not been married, although they had always intended to get married.

3. If the statement of the claimant to the effect that they "always intended to get married but did not" stood alone, the finding that she and Mike were husband and wife could not be sustained. However, when considered with all the testimony, it is apparent that she had reference to a formal ceremony. The conduct of the parties was consistent with the marriage and inconsistent with any relationship other than that of marriage.—*Judgment is affirmed.*

GARNISHMENT — ASSIGNMENT BEFORE GARNISHMENT — NECESSITY OF NOTICE — DEMURRER — NECESSITY OF DISPOSING OF — *Denver Joint Stock Land Bank of Denver vs. Anna M. Moore*—No. 13294—*Decided July 3, 1933*—*Opinion by Mr. Justice Bouck.*

This case arises out of conflicting claims asserted against funds held by garnishee. The latter is a sugar-beet company, which purchased sugar-beet crops from two separate tenant farmers who happened to have leased from the same landlord. The moneys involved are the landlord's share. Prior to garnishment the landlord assigned his interest to the bank, which assignment was not recorded, and the judgment creditor who garnisheed had no notice thereof. The assignee bank filed its petition in intervention, the judgment creditor filed answer thereto and the bank demurred. The court declined to hear argument on demurrer, and on trial dismissed the petition in intervention for want of equity, and judgment was entered against the garnishee in favor of the judgment creditor.

1. A garnishment can reach only such property as belongs to judgment debtor, who, in this instance, was the landlord.

2. The allegations of the petition in intervention are sufficient to make out a prima facie case for the intervening assignee, the bank.

3. It was not necessary that the assignment from the landlord to the bank be recorded.

4. Neither is it essential that notice of assignment should be given in advance to a garnishee, although in the absence of knowledge or notice, a garnishee would be protected against double payment if in pursuance of court orders he should pay under the garnishment in ignorance of the assignment.

5. If, during the pendency of the garnishment proceedings, it is proved that an assignment antedating the garnishment was executed, the absence of previous notice to the garnishee is immaterial.

6. A judgment creditor is not entitled to notice as such.

7. It is not proper for the trial court to refuse to permit argument on a pending demurrer. The proper practice is to dispose of pending demurrers before entering upon the main trial; and when attorneys express a desire to argue the law or the facts on a demurrer, it is well for the judicial patience to accede to the request.—*Judgment reversed.*

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RECEIVERSHIP —RIGHTS AND DUTIES OF SHAREHOLDERS ON CONTRIBUTIONS —*McPherson vs. The Railway Savings and Building Association* —No. 13282—*Decided July 8, 1933*—*Opinion by Mr. Justice Butler.*

McPherson brought this suit as a test case against the association in equity to compel it to recognize its capital liability to shareholder in the sum of $7,811.93 on stock held by plaintiffs and to restrain the association from charging against such capital account of the plaintiffs any part of the money paid to them in maturing other shares formerly owned by plaintiffs. The association filed answer alleging that shareholders were never credited with earnings to which they were entitled and that the association merely showed a book liability to each shareholder for the amount paid in by each, and that instead of maturing stock as required by its by-laws, it appropriated the earning that belonged to other shareholders and used the funds to arbitrarily mature stock on dates which by-laws estimated it would be matured, whether matured in fact or not; that at no time within past five years did the capital paid in by any shareholder, plus his pro-rata share of profits, equal the face value or matured value thereof; that all stock matured during said 5-year period was matured by improperly paying out a part of the capital paid in by other shareholders and earnings that should belong to other shareholders and that such unauthorized payments exceeded the sum of $500,000.

A demurrer was filed to this answer and sustained and plaintiffs stood upon the demurrer.

Decree entered that capital liability of the association to each of its shareholders is the amount paid in by each plus his proportionate share of earnings that should have been credited to his stock but was improperly paid to other shareholders, minus so much of the so-called dividends received as were in fact withdrawals of capital.

1. The decree was correctly entered and the court properly overruled the demurrer to the answer.

2. In a building and loan association all shareholders must fare alike; one shareholder cannot profit at the expense of another.

3. Stock matures when the amount paid in by a shareholder plus his share of the earnings equals the par value of the stock. The payment to a shareholder of the par value otherwise than as above is unwarranted.—*Judgment affirmed.*

TOO MUCH HUIE

Fannie Huie sued Soo Hoo when he (Hoo) held her handsome hack for his alleged lien for storage. Fannie finally finished in front. In deciding the appeal (22 Pac. 2nd, 808) the learned court referred to a similar incident in State vs. Shevlin, 23 Mo. App. 598, involving a horse, thus proving Ed Wynn was right after all.

SALES — FRAUD — MISREPRESENTATIONS — OF LAW — *Metzger vs. Baker*—No. 12823—*Decided August 2, 1933*—*Opinion by Mr. Justice Burke.*

Plaintiffs in error were plaintiffs below. They bought a Denver drug store for $10,000.00 and brought this action for $5,000.00 damages for false representations that defendants had represented that a city zoning ordinance zoned the district in which the store was located as residential and prevented the establishment therein of another drug store or the erection of additional business block, whereas there was no such ordinance and shortly after the purchase, another drug store was opened within a block and damages were suffered thereby. Plaintiffs were nonsuited.

1. Whether there was an ordinance on this subject and if so, what it permits or forbids, was a question of law and the general rule is that a misrepresentation of law is a mere expression of opinion, impotent to avoid a contract or support an action for damages.

2. This rule is subject to certain exceptions such as special knowledge possessed by one and not available to the other; a fiduciary relationship; representations as to the law of a foreign state; but none of these exceptions is applicable here.—*Judgment affirmed.*

EXECUTORS AND ADMINISTRATORS—RIGHT TO ADMINISTRATION—DISCRETION OF COURT—*In the Matter of the Estate of Thomas F. Woody, Deceased, vs. Woody*—No. 12869—*Decided August 2, 1933*—*Opinion by Mr. Justice Burke.*

Plaintiff in error was plaintiff below. He was a grand-nephew of deceased and upon his petition as next of kin was appointed administrator. Defendant, who was a nephew and moved to vacate the appointment on the ground he was more closely related, and order was vacated and defendant appointed administrator. On appeal to the District Court defendant had judgment.

1. Plaintiff complained that the order vacating his appointment by County Court was without notice. This point is not material now as there was a trial de novo in the District Court. The appearance of counsel in District Court was general and this waived such objection. Moreover, their motion was in the nature of a motion to quash a summons or its service. Such motion, when overruled, constitutes a general appearance.

2. In granting administration where there is no husband or widow the right goes to the next of kin. It is not necessary to decide whether this means those most nearly related to deceased or those entitled to take under the statute of descent and distribution. The court was vested with discretion and had full power as between "next of kin" to decide which next of kin was entitled to be appointed.—*Judgment affirmed.*

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